

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT
COUNTY OF RICHLAND)	OFFICER FOR CONSTRUCTION
)	
)	
IN THE MATTER OF: CANCELLATION)	
OF AWARD)	
COLLEGE BUILDINGS EXTERIOR)	WRITTEN DETERMINATION
WATERPROOFING)	
STATE PROJECT H51-9634-PG-V)	
)	
MEDICAL UNIVERSITY OF)	POSTING DATE: January 31, 2006
OF SOUTH CAROLINA)	
)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a January 20, 2006 request from the Medical University of South Carolina (“MUSC”) under the provisions of §11-35-1520(7) of the South Carolina Consolidated Procurement Code (Code), for the cancellation of award for the College Buildings Exterior Waterproofing project (“the Project”). [Exh. 1] The basis for the request is ambiguity in the Bidding Documents sufficient to create confusion in the minds of potential bidders.

ANALYSIS

Agencies shall “...set forth all requirements of the bid...” [Code §11-35-3020(2)(b)] These requirements include the identification “...by specialty...any subcontractors who are expected to perform work which is vital to the project.” [Code §11-35-3020(2)(b)(i)]

MUSC solicited competitive sealed bids for the Project on November 3, 2005. [Exh. 2] The general scope of work was repair of exterior brick work and installation of new flashing. The solicitation defined certain requirements for bidder eligibility, as follows:

Eligible bidders shall include general contractors with the license sub classification of specialty roofing or sub-contractors with the general contractor’s specialty sub classification license of specialty roofing.

MUSC did not list “specialty roofing” as a subcontractor specialty on page BF-2 of the SE-330, Bid Form, for the Project. [Exh. 4]

On November 23, 2005 MUSC issued Addendum 1 [Exh. 3] to the Bidding Documents. [Exh. 4] Included in the addendum (see page PBM-9) was the following question and answer from the mandatory pre-bid meeting:

12. *Q. The SE-310, Invitation for Construction Bids, states that eligible bidders shall include General Contractors with license sub classification of specialty roofing or sub-contractors with the General Contractors Specialty sub classification license of specialty roofing. Is this required since no roofing work is included in the Contract Documents?*

A. Yes. If the General Contractor does not have the sub classification of specialty roofing, the General Contractor will be required to provide a sub-contractor with the appropriate license. This will only be necessary if the roof system is damaged by the work and requires repairs.

On December 1, 2005 MUSC received and opened bids. On December 2, 2005 MUSC posted a Notice of Intent to Award in favor of Assurance Waterproofing Co., Inc. No work has been performed on the Project.

The situation presented to the CPOC is certainly novel. To summarize:

1. MUSC's solicitation made possession of a specialty roofing license a requirement for bidder eligibility, even though there was no specialty roofing work included in the as-bid scope of work for the Project.
2. The requirement for a specialty roofing license was of sufficient importance that it was included in the Bid Form's description of the scope of work [Exh. 5, page BF-1], yet not so important as to merit listing as a specialty "vital to the project." [Exh. 5, page BF-2]
3. When queried at the mandatory pre-bid meeting¹, MUSC's addendum offered a "clarification" that was anything but. After affirming the requirement for the specialty roofing license in the first half of the answer to Question 12, MUSC goes on to state that the license is required only in the event work outside the scope of the as-bid contract is performed.

Regulation 19-445.2085.C provides that the CPOC may cancel an award prior to performance and, in his discretion, order resolicitation for any one of several reasons.

1. Awards may be canceled because inadequate or ambiguous specifications were cited. [Regulation 19-445.2085.C(1)] The CPOC believes the licensing requirements were materially unclear. When taken as a whole, MUSC's bidding documents created a

¹ When a pre-bid meeting is declared mandatory, only those firms represented at the meeting are eligible to submit bids for the work.

situation where prospective bidders were on one hand told that they (either directly or through a subcontractor) were required to possess at the time bidding a license for work they were not, in fact, offering to perform. On the other hand, bidders were told that the specialty roofing license requirement applied only in the event the roof surface was damaged — an entirely speculative and undesired situation. As noted above, MUSC failed to clarify its requirement.

2. Awards may be canceled when such action is in the best interests of the State. [Regulation 19-445.2085.C(8)] Specifications shall be drafted so as to assure cost effective procurement of the State's actual needs and shall not be unduly restrictive. [Code §11-35-2730] The CPOC finds that the specialty roofing licensing requirement is unduly restrictive. South Carolina's contractors' licensing law requires that contractors possess valid licenses at the time they offer to perform work covered by the statute. [§40-11-30, S.C. Code of Laws, annotated] Contractors should not be required to possess qualifications unrelated to the work they are required to perform. It is reasonably foreseeable that firms lacking such a license but otherwise competent to perform the actual Project work would be discouraged from bidding. It is impermissible for an agency to impose an unnecessary requirement that acts to unduly restrict the field of competition.

The CPOC finds that MUSC's initial solicitation documents were fatally flawed as issued and the attempt at clarification documented in Addendum 1 only compounded the confusion. The ambiguity and undue restrictiveness in MUSC's requirements are both material and negative in its impact on the field of competition.

DETERMINATION

Under the authority granted by SC Code Regulation 19-445.2085(C), the CPOC hereby cancels, prior to performance and in its entirety, the Notice of Intent to Award to Assurance Waterproofing. The Medical University of South Carolina shall proceed to formally notify Assurance Waterproofing of the cancellation. MUSC is further directed revise the specifications in accordance with its request for cancellation and to re-solicit this procurement consistent with its programmatic needs.

IT IS SO ORDERED

A handwritten signature in cursive script that reads "Michael M. Thomas". The signature is written in dark ink and is positioned above a horizontal line.

Michael M. Thomas
Chief Procurement Officer for Construction
January 31, 2006
Date

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b) states:

(1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:

(b) requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under §11-35-4210, §11-35-4220, or §11-35-4230, but was not, shall not be the subject of review under this paragraph. Requests for review under this paragraph shall be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of such written determinations, decisions, policies, and procedures.

Additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILING FEE: Pursuant to Proviso 66.1 of the 2005 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code §11-35-4210(6), §11-35-4220(5), §11-35-4230(6) and/or §11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2005 S.C. Act No. 115, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003). Copies of the Panel's decisions are available at www.state.sc.us/mmo/legal/paneldec.htm